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No. 05-901

Supreme Court, U.S.
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In The

# Supreme Court of the United States

VAUGHN H. BRUENN,

*Petitioner,*

v.

NORTHROP GRUMMAN CORPORATION, KENNETH MARKS, AND DOES 1-10,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Court Of Appeal Of California, Second Appellate District**

## PETITION FOR REHEARING

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*Petitioner, in Propria persona*

April 20, 2006

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## PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44.2, Petitioner Vaughn H. Bruenn ("Bruenn") respectfully moves this Court for an order (1) vacating its denial of the Petition for Writ of Certiorari entered March 27, 2006, and (2) granting the petition.

This Court should grant Bruenn's petition for rehearing on the basis that Bruenn's due process rights were violated when the trial judge failed to remove an incompetent juror, thereby denying Bruenn his constitutional right to trial by fair, impartial and competent jurors pursuant to the Seventh Amendment to the United States Constitution and Article I, § 16 of the California Constitution.

Petitioner Bruenn was also denied the opportunity to present credible and verifiable evidence of employment discrimination in the form of a discriminatory remark by one of Respondent's supervisory staff. Prior to trial on July 28, 2003, Respondent brought its Motion *in Limine* No. 2 to exclude evidence of a "stray remark" made by Mr. McClain, a decision-making manager at Northrop. The trial court granted the motion to exclude the "don't ask, don't tell" statement, which was made by Mr. McClain in a mocking manner upon Petitioner's return to work after a five-month medical leave, apparently a "between the lines" joke mocking Petitioner because he was thought to have AIDS, though in reality he had been diagnosed with depression and chronic hepatitis C. Bruenn's supervisors and co-workers believed Bruenn to be a homosexual afflicted with AIDS, and the "stray remark" supports the claim that the employer created a discriminatory work environment intended to harass, intimidate and anguish Bruenn.

The granting of the Motion *in Limine* No. 2 prevented the jury from hearing relevant, admissible evidence on the issue of "pretext" under California's Fair Employment and Housing Act ("FEHA"), the statutory equivalent to the Americans with Disabilities Act ("ADA"). The ADA was enacted to combat discriminatory practices against persons with or thought to have or suffer from disabilities, including AIDS and Hepatitis C. The so-called "stray remark" was relevant and admissible evidence under Cal. Evid. Code § 351 for purposes of rebutting the employer's alleged non-discriminatory reason for terminating Petitioner. The evidence explains why Petitioner's co-workers were shunning and avoiding him, and why his performance at work had come under attack. Accordingly, the evidence should not have been excluded. The "stray remark," when reviewed in the totality of circumstances, supports Bruenn's wrongful termination claim. The trial judge's decision to exclude Bruenn's proffered evidence was negligent and prejudicial. But for the exclusion of this evidence, Bruenn would have been able to support his claim of discrimination or to present further collaborating evidence in support of his claim. Bruenn's proffered evidence (the "stray remark") was crucial to prove his claim of discrimination. The exclusion of Bruenn's proffered evidence constitutes judicial error, which can only be reversed through the granting of the petition.

## I. THE U.S. SUPREME COURT HAS A DUTY TO RESOLVE THE CONFLICT IN THE COURTS OF APPEALS ON AN IMPORTANT ISSUE OF STATUTORY INTERPRETATION.

Bruenn's chief argument for certiorari is that the decision below conflicts with those of other courts of

appeals and most importantly, with a previous United States Supreme Court ruling relating to right to fair, impartial and competent jury trials. Pet. at 3-4. Bruenn's secondary argument relates to the improper exclusion of relevant evidence prior to trial. Pet. at 3-4. Respondent does nothing to rebut this contention. Instead, Respondent misleads the Court with misquotes and misapplication of law, arguing that the state court never considered nor was there any issue involving federal law or protections. Opp. at 3-4. However, even state courts must always comply with the United States Constitution and the fundamental protections granted thereby. Petitioner points out that the lower courts and the United States Supreme Court are divided as to whether the right to a jury trial is a fundamental right protected under the Seventh Amendment of the United States Constitution.

Article I, Section 16 of the California Constitution mirrors the Seventh Amendment of the United States Constitution. The California Supreme Court created a legal fiction that the "presumption of prejudice" can be rebutted by the trier of fact, *sua sponte*, thus permitting the trier of fact to bypass the need to conduct a hearing on juror incompetence. This is not a matter where a litigant is denied a jury trial through waiver or arbitration as Respondent argues. The significance being that since California has incorporated the language and intent of the Seventh Amendment into its constitution, and has formulated identical court rules, the impingement of the right to a fair, impartial and competent jury properly and justifiably transforms this issue into a federal law issue by virtue of the fact that Article I, Section 16 of the California Constitution is, in essence, the Seventh Amendment of the United States Constitution.

The issue of juror misconduct here relates to juror incompetence due to limited English proficiency, preventing the juror from performing his duties under California Civil Procedure ("C.C.P.") § 203(a)(6), thus rendering him "unqualified" to participate in deliberations. This right to a fair and impartial jury implies "the right to a mentally competent jury." *McIlwain v. United States*, 464 U.S. 972, 975 (1983) (citing *Jordan v. Commonwealth of Massachusetts*, 225 U.S. 167, 176 (1912)).

This Court dealt with the broader view of juror misconduct and held that "[d]ue process implies a tribunal both impartial and mentally competent to afford a hearing." *Tanner v. United States*, 483 U.S. 107, 126 (1987) (citing *Jordan*, *supra*, at 176). Unfortunately, the *Tanner* court stopped short of validating post verdict investigation into juror misconduct, fearing investigations would tarnish the process and reduce the effectiveness of the jury system, notwithstanding "irresponsible or improper juror behavior." *Tanner*, at 142. This ruling is clear in purpose and intent. Nonetheless, the *Tanner* ruling was vague as to its application, and thus served as the stimulus for the lower courts to disregard and misinterpret the right to a fair, impartial and incompetent jury.

In the instant case, the trial court judge received a note from the jury foreperson stating that one of the jurors was having trouble speaking English. The note read: "One of our jurors, while understanding the testimony, is finding it difficult to understand the liberations [*sic*]. English is his second language. We all feel this may jeopardize our deliberations. He says he needs a translator." Pet. at 26a (Appendix D). The facts are clear and unambiguous; the juror in question was going to be just as incompetent on Monday as he was on the previous Friday

because he could not understand the testimony at trial. Since the state law merges with federal law as regards the right to a fair, impartial and competent jury trial, the matter now becomes an issue of federal law adaptation and application. The hybrid nature of the California law with regards to the Seventh Amendment right to jury trial mandates further review by this Court.

A leading Ninth Circuit case has spoken on the matter by holding that a presumption of prejudice arises from any juror misconduct or incompetence. *Hasson v. Ford Co.*, 32 Cal.3d 388, 416, 650 P.2d 1171, 185 Cal. Rptr. 654 (1982). The *Hasson* court logically reasoned that "civil litigants, like criminal defendants, have a constitutionally protected right to the complete consideration of their case by an impartial panel of jurors." (U.S. Const., 7th Amend.; Cal. Const., art. I, § 16) *Hasson*, at 416 (citing *Andrews v. County of Orange*, 130 Cal.App.3d 944, 953 [182 Cal.Rptr. 176] (1982); *People v. Honeycutt*, 20 Cal.3d 150, 156, [141 Cal.Rptr. 698, 570, P.2d 1050] (1977)). In the instant case, there was clear evidence of prejudice by the juror's incompetence based on his/her limited English proficiency.

But the California Supreme Court ignored and completely bypassed the "presumption of prejudice" rule and failed to give any weight to constitutional ramifications when it received the juror note and failed to investigate. The note offered proof of the offending juror's inability to perform his/her duties. Each juror must be able to actively participate in the deliberation process; to exchange ideas and offer different viewpoints – in essence, to have meaningful discourse, to listen and present their own analysis. Were the rule otherwise, litigants could be deprived of the complete, thoughtful consideration of the merits of their cases to which they are constitutionally entitled. (U.S.

Const., 7th Amend.; Cal. Const., art. I, § 16.) *Hasson*, at 416. The Seventh Amendment and Article I, Section 16 (California) right to jury trial thus become meaningless if the lower courts are permitted to franchise their own misguided interpretation of federal law, ignoring the essence and spirit of the law. This Court issued its ruling in *Tanner*, but the ruling was ambiguous at best. The law has become obtuse and unpredictable, and for that reason this Court must resolve this conflict in law by vacating its denial of the petition and granting Petitioner's writ of certiorari.

## II. THIS IS A MATTER OF NATIONAL PUBLIC INTEREST AND MERITS STRICT SCRUTINY AS THE RIGHTS INVOLVED ARE PROTECTED UNDER THE UNITED STATES CONSTITUTION AND THUS, ARE OF NATIONAL PUBLIC INTEREST.

This is a matter of national public interest and this Court must protect against the consequences of incompetent jurors; wrongful exclusion of relevant evidence; and sex/disability discrimination in the workplace. These issues are ripe for resolution because in this ever increasing corporate friendly judicial system coupled with the government's *laissez faire* attitude allowing corporations to successfully challenge meritorious discrimination suits through the use of ingenious labor practices and savvy lobbying, they will continue to recur until this Court gives this matter the importance it merits.

This issue of incompetent jurors is of paramount importance as the pool of jurors diversifies exponentially with people from all walks of life, different cultures and beliefs, and highly varied English competency levels. As

the potential juror pool diversifies, so does the need to insure that all jurors are competent and that they have the minimum English proficiency skills needed to comprehend the evidence presented at trial and participate in the jury deliberations. This issue needs to be addressed and resolved by this Court. Accordingly, the Court should grant certiorari and resolve these issues now.

Respondent argues, through misconstruing both the argument advanced in the petition and the parameters of the questions presented, that the Seventh Amendment does not apply to this case because it is a state civil matter tried under state court rules. Though earlier cases do state that "the Reexamination Clause [of the Seventh Amendment] prohibits appellate review . . . , they do not foreclose the practice altogether." *Gasperini v. Center for Humanities*, 518 U.S. 415, 442 (1996) (citing *Southern Railway-Carolina Div. v. Bennett*, 233 U.S. 80, 87 (1914)). The law is unclear as to the extent of Seventh Amendment protections because there is conflict among the lower courts. Also lacking also is guidance from the U.S. Supreme Court.

In the instant case, though the proceedings may have been dictated by State law, the hybrid character of the proceedings was federal in nature through incorporation of federal matters dealing with: (1) The right to a fair, impartial and competent jury as mandated both state and federal constitutions; (2) the improper exclusion of relevant material evidence; and (3) sex and disability discrimination based on violation of FEHA, a state law "Siamese twin" of ADA. To the extent that this confusion is derived from the mistaken analysis of the court below, it is an additional reason to grant review and clarify the law in this area.

Respondent argues that "Petitioner's alleged constitutional basis under the Seventh Amendment for this Petition is without merit, as the Seventh Amendment does not apply to state court civil proceedings." Opp. at 3-4. Respondent cites *Elliott v. City of Wheatridge*, 49 F.3d 1458, 1459 (10th Cir. 1995). Respondent further argues that "there is no constitutional right to a civil jury trial outside of an Article III forum." *Hawkins v. Aid Association for Lutherans*, 338 F.3d 801, 808 (8th Cir. 2003).

However, the *Hawkins* ruling is inapplicable to the instant case because that case revolved around an arbitration dispute. A valid arbitration provision, which waives the right to resolve a dispute through litigation in a judicial forum, indirectly waives the attendant right to a jury trial. The case at bar involves not arbitration or any waiver of the right to a jury trial, but an actual jury trial which went awry. This case necessarily introduces a federal question by the very nature of the right alleged to have been violated; the right to a competent jury. Thus, Respondent's arguments and supporting citations are inapplicable to the instant case.